

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No.: 3:11-CV-00374-MOC-DSC**

ROY F. WILLIAMS,

Plaintiff,

v.

**KENNY CHARLES E. HABUL AND
CORNELIUS ONE, LLC,**

Defendants.

DEFENDANTS' MOTION TO DISMISS

Defendants Kenny Charles E. Habul and Cornelius One, LLC move to dismiss the Complaint, pursuant to Federal Rules of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. As developed in the accompanying brief, Williams' claims are barred by the following tenets of applicable law:

(i) Williams has unambiguously released his claims against Defendants, a release which was immediately effective once Williams received payment of \$1,018,797 from Defendant Habul;

(ii) Williams' assertion that Habul has breached certain provisions of the settlement agreement ignores that (a) the payment was the only condition precedent for the Release; (b) Williams' remedy for the purported breaches is for damages or specific enforcement of the contract – not rescission; and (c) Williams could not rescind the agreement in any event because he has retained the \$1 million plus payment he received from Habul under that contract;

(iii) under the North Carolina law of election of remedies, Williams may not seek to rescind a settlement agreement that he has chosen to enforce in state court; and

(iv) *res judicata* prohibits Williams from bringing the same claims that the state court has ordered him to dismiss with prejudice. The Order of Honorable Calvin E. Murphy states in pertinent part: “The Court having resolved this matter against Plaintiff and in favor of Defendants, Plaintiff shall, therefore, file a Notice of Dismissal with Prejudice as provided in the Settlement Agreement within five (5) business days of entry of this Order.”

In support of this motion, Defendants rely on the supporting brief and exhibits attached thereto.

This 24th day of August, 2011.

s/ John R. Wester

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **DEFENDANTS' MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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This 24th day of August, 2011.

s/ John R. Wester

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